

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In re Applications of

SCRIPPS HOWARD BROADCASTING
COMPANYFor Renewal of License of
Station WMAR-TV,
Baltimore, Maryland

and

FOUR JACKS BROADCASTING, INC.

For a Construction Permit for a
New Television Facility on
Channel 2 at Baltimore, Maryland

MM Docket No. 93-94

File No. BRCT 93-94

RECEIVED

MAY 11 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

File No. BPCT-910903KE

TO: The Honorable Richard L. Sippel
Administrative Law JudgeMOTION FOR SUMMARY DECISION

Four Jacks Broadcasting, Inc. ("Four Jacks"), by its attorneys and pursuant to Section 1.251(a)(1) of the Commission's rules, hereby moves for summary decision of the air hazard issue (Issue No. 1) specified in the Commission's Hearing Designation Order ("HDO"). DA 93-340 (released April 1, 1993). This motion

According to the HDO, the rationale for the addition of the air hazard issue was as follows:

Four Jacks specifies a tower height of 381 meters. However, the record height for the specified tower is only 368.5 meters due to the removal of an antenna from the tower in 1987. Thus, it is not clear that the Federal Aviation Administration has approved the proposed tower increase to 381 meters and that the proposal would not constitute a hazard to air navigation. While these discrepancies do not render the application substantially incomplete, an appropriate issue will be specified to determine whether the tower would constitute a hazard to air navigation.

(HDO, para. 2).

2. The Four Jacks application, filed September 3, 1991, proposed to mount Four Jacks' antenna on an existing tower which had already been cleared by the Federal Aviation Administration ("FAA") for use at 381 meters (1249 feet AMSL). See Aeronautical Study No. DCA-OE-68-19 (issued April 2, 1968), a copy of which is attached hereto as Exhibit 1. Where an applicant proposes to mount its antenna on an existing tower which has already been cleared by the FAA, the Commission does not require the applicant to file for further clearance with the FAA. EZ Communications, Inc. et al., DA 93-361, (M. Med. Bur., released April 5, 1993), para. 21, attached hereto as Exhibit 2.

3. At the time Four Jacks filed its application, the tower remained in the FAA's database pursuant to the 1968 FAA approval. In any event, the FAA reaffirmed on February 14, 1992 that the height that Four Jacks proposes (381 meters or 1249 feet AMSL) does not pose a hazard to air navigation. See Aeronautical Study

No. 92-AEA-0200-OE, issued February 14, 1992), a copy of which is attached as Exhibit 3. Thus, it is clear that the FAA has determined that the tower height and location proposed by Four Jacks does not constitute a hazard to air navigation.

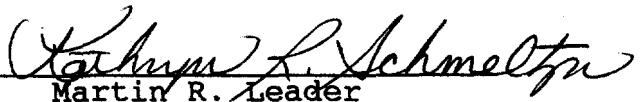
4. Section 1.251 of the Commission's rules provides that summary decision is appropriate where there is no genuine issue of material fact for determination at the hearing. Here, the FAA has consistently ruled that the tower height and location proposed by Four Jacks do not constitute a hazard to air navigation. It is also well established that "[t]he primary purpose of the summary decision rule is to avoid useless hearings." Telecorpus, Inc., FCC 74M-848, 30 RR2d 1641 (ALJ 1974). Four Jacks has demonstrated that no genuine issue of material fact remains to be decided under the air hazard issue, and the issue should therefore be resolved in favor of Four Jacks.

According, for the foregoing reasons, Four Jacks Broadcasting, Inc. respectfully requests the Presiding Judge to grant this Motion for Summary Decision and resolve the air hazard issue (Issue 1) in favor of Four Jacks.

Respectfully submitted,

FISHER, WAYLAND, COOPER
& LEADER
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Suite 800
Washington, D.C. 20037
(202) 659-3494

FOUR JACKS BROADCASTING, INC.

By 
Martin R. Leader
Kathryn R. Schmeltzer
Matthew P. Zinn

Its Attorneys

Date: May 11, 1993

Exhibit 1

April 2, 1968

DCA-520

AERONAUTICAL STUDY NO. DCA-OE-68-19

DETERMINATION OF NO HAZARD TO AIR NAVIGATION

The Federal Aviation Administration has circularized the following described construction proposal and has conducted an aeronautical study to determine its effect upon the safe and efficient utilization of navigable airspace.

PROPOSER:	Commercial Radio Institute, Inc.	STRUCTURE	<u>Antenna Tower</u>
LOCATION :	Catonsville, Md.	HEIGHT ABOVE GROUND	<u>709 Ft.</u>
Latitude :	39°17'13" North	ABOVE MSL	<u>1249 Ft.</u>
Longitude:	76°45'16" West		

A Determination of No Hazard was issued for a 1200 ft. AMSL tower at this site (Case No. DCA-OE-66-100). This proposal is to increase that height by 49 feet. The structure would exceed obstruction standards in Part 77, Federal Aviation Regulations, Section 77.23(a)(1) in that the structure would be more than 500 feet above ground and Section 77.23(a)(5) in that the structure would be less than 1451 ft. below the minimum enroute altitude of Federal Airway V268.

Two objections were received in response to the circularization. These were based primarily on the conclusion that the structure would affect the utilization of the proposed Instrument Landing System (ILS) which will serve Runway 15 at Friendship International Airport and that the structure would tend to restrict the use of airspace in the vicinity of the airport.

The aeronautical study showed that the tower would have no adverse

Therefore, pursuant to the authority delegated to me, it is found that the structure would have no substantial adverse effect upon the safe and efficient utilization of navigable airspace and it is hereby determined that the structure would not be a hazard to air navigation provided the structure is obstruction marked and lighted in accordance with FAA standards.

This determination is subject to review by the Administrator if a petition is filed on or before May 1, 1968. If no petition is filed, the determination becomes final on May 11, 1968. If a petition is filed, further notice will be given and the determination will not become final pending disposition of the petition.

Petitions for discretionary review must be filed in triplicate with the Chief, Obstruction Evaluation Branch, Federal Aviation Administration, Washington, D. C. 20553, within 30 days after the date of issuance and must contain a full statement of the basis upon which it is made.

This determination expires on November 11, 1968, unless application is made to the FCC for a construction permit before that date, or the determination is otherwise extended, revised, or terminated. If application is made to the FCC within the six month time period, the determination expires on the date prescribed in the FCC construction permit for completion of construction or on the date the FCC denies the application.

Notice to this office is required at least 48 hours before the start of construction and again within five days after construction reaches its greatest height.

Original signed by

L. I. Pearce
Chief, Air Traffic Branch

Issued on April 2, 1968

Z-EA-DCA-300

Exhibit 2

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-88

In re Applications of

EZ COMMUNICATIONS, File No. BRH-910401C2
INC.

For Renewal of License of FM
Radio Station WBZZ(FM) on
Channel 229B at
Pittsburgh, Pennsylvania

ALLEGHENY File No. BPH-910628MC
COMMUNICATIONS
GROUP, INC.

For a Construction Permit for a
New FM Broadcast Station on
Channel 229B at
Pittsburgh, Pennsylvania

HEARING DESIGNATION ORDER

Adopted: March 26, 1993;

Released: April 5, 1993

By the Chief, Audio Services Division, Mass Media Bureau:

1. The Commission, by the Chief, Audio Services Division, Mass Media Bureau, acting pursuant to delegated authority, has before it for consideration: (a) the application of EZ Communications, Inc. (EZ) for renewal of license of station WBZZ(FM), Pittsburgh, Pennsylvania; (b) the application of Allegheny Communications Group, Inc. (Allegheny) for a construction permit for a new FM station on Channel 229B at Pittsburgh, Pennsylvania; (c) a Petition to Deny the WBZZ(FM) license renewal application, filed June 28, 1991, by Allegheny; (d) an Opposition to Petition to Deny filed on July 29, 1991, by EZ; (e) a Reply to Opposition to Petition to Deny filed on August 19, 1992,

Allegheny's Petition to Deny

2. On June 28 1991, Allegheny filed a petition to deny EZ's renewal application for Station WBZZ(FM). Allegheny requests the specification of five issues relating to EZ's qualifications to be a Commission licensee. The five issues are all based on matters which were the subject of an arbitration proceeding and two civil suits involving WBZZ's former news director, Elizabeth Nelson Randolph.

Background

3. In the arbitration proceeding, an arbitrator sustained a grievance brought by the American Federation of Television and Radio Artists-Pittsburgh on Randolph's behalf alleging that Randolph had been wrongly discharged by EZ. The arbitrator's decision finds that from 1986 to 1988, while she was a newscaster for WBZZ, Randolph had been the subject of repeated insulting on-the-air remarks of a sexually provocative nature by two WBZZ announcers. The arbitrator determined that, after one such incident, Randolph became so distressed that she could not go on the air and left the station without completing her final news reporting segments.¹ After she left, WBZZ's general manager suspended the two announcers and instituted an investigation of the incident. When Randolph returned to work later that day, she was placed on leave of absence pending an investigation. Subsequently, based on her unauthorized failure to fulfill her on-air assignment, WBZZ terminated Randolph's employment. Ultimately, the arbitrator found that Randolph's walking off the job was reasonable, and awarded her severance benefits. An action instituted by EZ to vacate the award was denied (Civil Action 88-2636).

4. In addition to the grievance, Randolph filed a complaint against EZ and the two announcers in the Court of Common Pleas of Allegheny County. In her suit she sought damages for defamation, intentional infliction of emotional distress and invasion of privacy (Case No. GD88-02730). Randolph also filed a sex discrimination complaint with the Pennsylvania Human Relations Commission which resulted in the issuance of a right to sue letter. Randolph then commenced a second civil suit against EZ in the court of Common Pleas of Allegheny County (Case No. GD89-22010). On February 14, 1990, the jury, in case No. GD88-02730, awarded a verdict in favor of Randolph. While appeals on the jury trial were still pending, both cases (GD88-02730 and GD89-22010) were settled simultaneously by the parties. The settlement agreement provided that Randolph would not file or assist in the filing of a complaint with the FCC and that if called upon to testify concerning the subject matter of her law suits she will not on the ground that she is prohibited from doing so by court order.² By Order dated July 1, 1991, the

points out that there is no evidence that the allegedly offensive remarks were made during newscasts or were ever intended to constitute news.

6. In *Hunger in America*, 20 FCC 2d 143, 151 (1969), the Commission found that "[r]igging or slanting the news is a most heinous act against the public interest...." Here, however, there is no evidence that the statements concerning Randolph were made in the context of a news broadcast or were intended to constitute news. Moreover, given the entertainment context of the statements, we do not believe that the listening public would construe the statement as news. Consequently, we will decline to add a news distortion issue.

Indecency Issue

7. Allegheny relies on a determination by the arbitrator that the nature of the material broadcast was "lewd, offensive, sophomoric, in bad taste and beyond anything that an employee should be subjected to - even if they are part of an 'entertainment vehicle,'" to argue for the specification of an issue to determine whether WBZZ broadcast indecent material in violation of 18 U.S.C. Section 1464. Allegheny notes that the material was broadcast in the morning, a time period when children may be in the audience. Citing, *Great American TV and Radio Co., Inc.*, 66 RR 2d 1557 (Mass Media Bur. 1989). Allegheny also cites the court's holding in *Monroe Communications Corporation v. FCC*, 900 F.2d 351 (D.C. Cir. 1990) rejecting a Commission ruling that excluded the consideration of obscenity broadcasts in the renewal context.

8. The Commission has defined broadcast indecency as language or material that, in context, depicts or describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. Indecent programming contains sexual or excretory references that do not rise to the level of obscenity. As such, indecent material is protected by the First Amendment and cannot be banned entirely. It may, however, be restricted in order to avoid its broadcast during times of day when there is a reasonable risk that children may be in the audience. Consistent with existing court decisions in this area, the Commission currently prohibits the airing of indecent material between 6:00 a.m. and 8:00 p.m.⁴ See *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). The Commission will act on all documented complaints of indecent or obscene broadcasting that it receives. Given the sensitive nature of the cases, it is important that the Commission be provided as full a record as possible to evaluate allegations of obscene or indecent programming. Consequently, the Commission requires (1) a tape, transcript, or significant excerpts of the program; (2) the date and time of the broadcast; and (3) the call sign of the station involved.

9. We note that in the instant case, the Federal Communications Commission has received no complaints alleging the broadcast of indecent matter by WBZZ. Moreover, we note that neither the court nor the arbitrator reached a determination that the material broadcast by WBZZ was either obscene or indecent. The arbitrator and the court determinations were directed to the impact of the broadcasts on an employee of the station and not to whether the matter broadcast was obscene or indecent.⁵ Moreover, Allegheny has not provided a tape, transcript or significant portion of the broadcast in question which would permit the Commission to make an independent determination that the broadcast matter was either obscene or indecent. Absent this documentation we are left to speculate as to the exact nature and context of the broadcast matter which distressed Randolph. As a final matter, even if we were to find that the "joke" itself was indecent, we would be disinclined to designate an issue against EZ based on an isolated incident which apparently was never repeated. This is especially so in light of the evidence that upon learning of the "joke," management took immediate action by suspending the announcers responsible and investigating the incident. Under these circumstances we will not specify an indecency issue.

Discrimination Issue

10. Allegheny also seeks an issue to determine whether EZ violated Section 73.2080(a) of the rules which provides that "no person shall be discriminated against in employment by such stations because of... sex." Allegheny contends that by subjecting Randolph to sexually oriented "banter," Randolph was compelled to assume the role of a stereotypical "bimbo" as a condition of her employment. In its Opposition, EZ points out that Randolph was paid to participate in an entertainment program and that her suit, based on remarks by her co-performers which were intended to be comedic, was a highly unusual claim for which there is little or no precedent. Finally, EZ notes that there is no basis for the requested issue because there has been no allegation that WBZZ's female and minority employment record was deficient.

11. A sex discrimination issue will not be specified. Section 73.2080 is designed to prevent discrimination by licensees on the basis of race, color, religion, national origin or sex in the recruiting, hiring and promoting of employees. Allegheny has not demonstrated any discrimination in recruiting, hiring or promoting of employees by EZ. Moreover, the matter on which Allegheny relies has been the subject of two lawsuits by Randolph. These law suits have been settled while appeals were still pending. Under this circumstance, we are disinclined to specify an issue. See, *Policy Regarding Character Qualifications in Broadcast Licensing (Policy Statement)*, 102 FCC 2d 1179, n.63 (1986), *recon. granted in part, denied in part*, 1 FCC

⁴ In its *Report and Order*, FCC 93-42, released January 22, 1993, the Commission adopted a rule to implement a Congressional mandate to prohibit the broadcast of indecent programming (a) between 6:00 a.m. and 10:00 p.m. by any public broadcast station that goes off the air at or before 12 midnight; and (b) between 6:00 a.m. and 12 midnight for any other radio station. The new hours were to become effective February 25, 1993. However, the D.C. Circuit Court of Appeals has stayed the effectiveness of the rule. See *Action for Children's Television v.*

FCC, Case No. 93-1092, *Order* filed February 23, 1993.

⁵ In this regard we note that the arbitrator found that "The jokes and suggestive remarks that were directed to her [Randolph] were lewd, offensive, sophomoric, in bad taste and beyond anything that an employee should have to be subjected to--even if they are part of an entertainment vehicle." *Award of Arbitrator*, (Case No. 55-300-0064-88) dated November 16, 1988, at page 12.

Rcd 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987).

Civil Misrepresentation Issue

12. Allegheny contends that the Commission has recognized that "civil misrepresentations not involving governmental units may be relevant to a broadcaster's character qualifications." *Policy Statement, recon. granted in part*, 6 FCC Rcd 3448 (1991). Here, Allegheny contends, EZ broadcast a civil misrepresentation concerning Randolph to the general public. Consequently, Allegheny contends, an issue is warranted to determine the impact on EZ's character qualifications of the decision of the arbitrator and the adjudication in Case No. GD88-02730.

13. A civil misrepresentation issue will not be specified. In the Commission's *Policy Statement*, the Commission, after recognizing that "some civil misrepresentations ... may be relevant to a broadcaster's qualifications," stated that, "[n]evertheless, based on our experience, we believe that the category of civil misrepresentation is too broad to be presumptively relevant to a broadcaster's qualifications." (emphasis supplied) *Id.* The Commission also stated that it may consider such matters on a case-by-case basis. *Id.* In the instant case, where the litigation has ended in a settlement to the apparent satisfaction of the parties, further investigation of this matter is not warranted.⁶

Abuse of Process Issue

14. Finally, Allegheny contends that addition of an abuse of process issue is warranted because the settlement EZ entered into with Randolph was designed to obstruct inquiry by the Commission. In this regard, Allegheny notes, Randolph is obligated, under threat of contempt, to refuse to honor any subpoena that might be issued by the Commission and the record in the litigation has been sealed. Allegheny points out that the settlement followed soon after the release of the Commission's reconsideration of its *Policy Statement*. According to Allegheny, the reconsideration created uncertainty as to whether the Commission would view the defamation action as a relevant FCC matter. Thus, Allegheny concludes, the settlement was an effort to preclude FCC scrutiny. It is well settled, Allegheny states, that it is an abuse of process for a party to attempt to induce, entice, coerce or otherwise improperly influence a witness or prospective witness in a Commission proceeding. *Citing, Chronicle Broadcasting Co.*, 19 FCC 2d 240, *rev. denied*, 23 FCC 2d 162 (1970); *Harvii Broadcasting Corp.*, 35 FCC 2d 94 (Rev. Bd. 1972) and *Kaye Smith Enterprises*, 98 FCC 2d 675 (Rev. Bd. 1984). Finally, Allegheny contends that the settlement interferes with Allegheny's right to obtain information for its petition to deny EZ's pending renewal application and may be violative of Section

73.3589 of our rules which restricts payments in exchange for refraining from filing a petition to deny or informal objection.

15. An abuse of process issue will not be specified. Section 73.3589 prohibits "payments in exchange for withdrawing a threat to file or refraining from filing a petition to deny or informal objection." Here there is no evidence that Randolph threatened to file a petition to deny or informal objection. Nor is there evidence that the payment to Randolph was in exchange for her agreeing not to file a petition to deny or informal objection. Moreover, while Allegheny is correct in its contention that an attempt to improperly influence a person with information would constitute an abuse of process, none of the cases cited by Allegheny support the conclusion that entering into an agreement to settle a civil suit, constitutes such an improper influence. Allegheny's contention that the settlement agreement infringes on its right to obtain the information it needs to successfully challenge EZ's license renewal is also without merit. Allegheny has the right to gather all the information concerning EZ that it can, consistent with the law. This it apparently has done. We fail to see how the settlement agreement has violated any of Allegheny's rights.

EZ's Petition to Dismiss or Deny

16. On December 6, 1991, EZ filed a petition to dismiss or deny Allegheny's application. In its petition, EZ claims that Allegheny's application is technically deficient and must be dismissed because it fails to provide protection to WQIO(FM), Mt. Vernon, Ohio, as required by Section 73.215 of the Commission's Rules. In its reply to Allegheny's opposition to its petition to dismiss or deny, EZ further argues that Allegheny's application should also be dismissed because it fails to protect a proposal to substitute Channel 228A for unoccupied Channel 223A at Barnesboro, Pennsylvania (MM Docket No. 87-433).⁷ EZ contends that because the Commission, in its *First Report and Order*, 4 FCC Rcd 4780 (1989), abolished the *Cameron Policy* which permitted challengers to specify an incumbent licensee's antenna site and technical facilities, challengers are no longer eligible for Section 73.213 processing.⁸ In its opposition, Allegheny notes that EZ's facilities are already short-spaced to WQIO by 36.2 km and that a grant of its application would reduce the short-spacing by 1.9 km. With regard to the Barnesboro proposal, Allegheny contends that it is only a proposed allocation and, as such, is not entitled to protection. Further, Allegheny argues that to deny Section 73.213 processing to renewal challengers would impermissibly impose disparate requirements on them that would create a pro-incumbent bias in comparative hearings. *Citing, Las Vegas Broadcasting Co. v. FCC*, 589 F.2d 594, 600 (D.C. Cir. 1978), wherein the court

⁶ We also note that "misrepresentations" reported in the arbitrator's decision and the court case were all made in the context of comedic skits which were broadcast as part of WBZZ's entertainment programming. We are disinclined to find that comments intended to be humorous, and which were broadcast with no intent to deceive the public constitute a "civil misrepresentation." See *Fox River Broadcasting*, 93 FCC 2d 127, 129 (1983), where the Commission held that misrepresentation necessarily includes an intent to deceive.

⁷ In an *Order to Show Cause*, 4 FCC Rcd 6939 (1989), the

Commission, by the Chief, Allocations Branch, changed the Barnesboro allocation to accommodate other modifications of the Table of Allotments.

⁸ Section 73.213(a) provides that, with respect to grandfathered short-spaced stations (stations on which the short-spacing existed as of November 16, 1964), a transmitter site or technical proposal may be modified so long as the proposed 1 mV/m contour "is not extended towards the 1 mV/m contour of any short-spaced station."

faulted the Commission for imposing an unreasonably strict financial qualifications standard on a renewal challenger.

17. We will not dismiss Allegheny's application as technically deficient. Here, Allegheny is seeking the license currently controlled by EZ. Our engineering study shows that the contours of EZ's existing station extend further in the direction of WQIO than do the contours of Allegheny's proposed station. Consequently, a grant of Allegheny's application would not result in an increase in radiation toward WQIO. Where a grant would not increase cognizable interference above and beyond that presently caused by the existing licensee the Commission will not dismiss or deny the challenger's application. See, *Royce International Broadcasting*, 2 FCC Rcd 1368 (1987). Moreover, while the Commission did eliminate the *Cameron* presumption in 1989, that presumption only related to the availability to a challenger of an incumbent licensee's facilities. By eliminating the presumption, however, the Commission did not change the challenger's right to have its application processed under the same standards as the incumbent's. In *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Stations Assignments by Using Directional Antennas*, 6 FCC Rcd 5356, 5364 (1991), the Commission specifically stated that it would permit existing short-spaced licensees

spacing.⁹ Because the Allegheny application was filed before the release of the *Report and Order*, Allegheny will be given thirty days from the release of this Order in which to amend its application to eliminate the conflict with the North Madison, Ohio, allotment.

19. EZ further contends that Allegheny's application should be dismissed because it violates Section 73.316(b)(2) of our rules which prohibits the authorization of directional antennas that have a radiation pattern which varies more than 2 dB per 10 degrees of azimuth. Allegheny, however, on August 30, 1991, timely amended, *inter alia*, the engineering portion of its application to modify its directional antenna proposal. EZ, utilizing the relative field tabulations for Allegheny's new proposal, argues that Allegheny's application, as amended, is still in violation of Section 73.316(b)(2) of our rules. Finally, EZ contends, Allegheny failed to state that its antenna will be mounted "in accordance with specific instructions provided by the manufacturer," and that "no other antennas of any type are mounted on the same tower level as a directional antenna, and that no antenna of any type is mounted within any horizontal or vertical distance specified by the antenna manufacturer as being necessary for proper directional operation," as required by Sections 73.316(c)(5) and (c)(7) of our rules, respectively. In response, Allegheny contends

specifies those antenna structures which require FAA notification. In any case, the FAA has registered no objection to Allegheny's proposal.

22. Finally, EZ contends that Allegheny's environmental statement does not establish compliance with the American National Standards Institute (ANSI) guidelines for human exposure to RF radiation because it fails to consider the other radio transmitter facilities co-located at its proposed site. A study by the Mass Media Bureau's engineering staff shows that there are multiple contributors to radio frequency radiation at Allegheny's proposed tower site. Therefore, Allegheny is ordered to submit a certification that, before commencement of construction, an agreement will be in effect requiring all stations to reduce power or cease operations as necessary to assure worker safety with respect to radio-frequency radiation when maintenance is to be performed at the site.

23. The staff's engineering study also reveals that Allegheny's response to Question 14 of Section V-B of FCC Form 301, which seeks information concerning receiver induced intermodulation interference, is insufficient. Specifically our study reveals that there is the possibility that Allegheny's signal, when mixed with the signals of two other stations, WORD, Pittsburgh, and WMXP, New Kensington, Pennsylvania, would produce a signal which has a potential to cause receiver-induced intermodulation interference (RITOIE) on the frequency of WLER(FM), Butler, Pennsylvania. Accordingly, Allegheny is ordered to investigate this matter and submit a statement to the presiding judge within thirty days of the release of this Order, specifically accepting full responsibility for the elimination of any objectionable interference (including that caused by receiver-induced or other types of modulation) to facilities in existence, facilities authorized, and radio receivers in use prior to grant of its application.

24. In addition to its allegations concerning Allegheny's engineering proposal, EZ claims that Allegheny's application should be dismissed or denied because Allegheny has no real interest in serving the needs of the Pittsburgh area. In fact, EZ contends, Allegheny's president, Herbert E. Long, Jr., a resident of northwest Washington, D.C. has been involved in two other applicants that filed renewal challenges against existing licensees which resulted in settlements.¹³ Allegheny's instant application, EZ notes, is represented by the same law firm that represented Long's other renewal challenges - the law firm of Cohen and Berfield. EZ charges that the Allegheny application is but one more in a long series of sham applications manufactured by this law firm for the purpose of extracting settlement payments from renewal applicants. In this regard EZ cites *WWOR-TV*, 6 FCC Rcd 4350 (A.L.J. 1991), *aff'd*, 7 FCC Rcd 636 (1992), appeal pending, *sub nom. Garden State Broadcasting Limited Partnership v. FCC*, No. 92-1065, (D.C. Cir. 1993).

by Cohen and Berfield after determining that the challenger had filed its application solely for the purpose of securing a settlement. In addition, EZ contends that Allegheny's counsel, Lewis Cohen, in investigating EZ, violated Pennsylvania law by knowingly examining and disseminating the record of a civil suit he knew to be under court ordered seal.

25. EZ's allegations do not warrant dismissal or denial of the Allegheny application. The fact that Allegheny's president was involved in two settlements does not establish that the Allegheny application was filed for an improper purpose. In this regard, we note that both settlements were in proceedings involving licenses held by RKO General, Inc. In the RKO cases, the Commission specifically encouraged the applicants to settle. *RKO General, Inc. (KHJ-TV)*, 60 RR 2d 1694 (1986); *RKO General, Inc. (KHJ-TV)*, 3 FCC Rcd 5057 (1988). Similarly, we do not believe that the fact that Allegheny's law firm has filed a number of applications challenging the renewals of existing stations warrants the conclusion that Allegheny's application was filed for an improper purpose. See *Fresno Limited Partnership*, 6 FCC Rcd 6998, n.3 (1991), wherein we found such claims irrelevant in determining an applicant's *bona fides*. Moreover, even though we have concluded that an applicant represented by the law firm of Cohen and Berfield filed its application solely for the purpose of obtaining a settlement, that does not establish that Allegheny did so. In any case, prior to the time Allegheny filed its application, we changed our rules to eliminate the possibility of a renewal challenger profiting by settlement. *First Report and Order in BC Docket No. 81-742*, 4 FCC Rcd 4780 (1989). Thus, the motivation suggested by EZ does not appear applicable to Allegheny. Finally, the propriety of counsel's review of the record in the civil suit brought by Randolph (See paragraph 4, *supra*) is a non-FCC matter which we do not take cognizance of unless it is adjudicated by an appropriate trier of fact. *Policy Statement*, 102 FCC 2d at 1204-5. Moreover, we note that it does not appear that counsel committed any impropriety because the record was not under seal at the time of his review. (See footnote 2, *supra*).

26. ACCORDINGLY IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications are DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge, at a time and place to be specified in a subsequent Order, upon the following issues:

- (a) To determine which of the captioned mutually exclusive applications for authority to operate on Channel 229B at Pittsburgh, Pennsylvania, would, on a comparative basis, best serve the public interest; and

(b) To determine, in light of the evidence adduced pursuant to the specified issue, which of the applications should be granted.

27. IT IS FURTHER ORDERED, That any construction permit awarded to Allegheny as a result of this proceeding shall be made contingent on the outcome of MM Docket No. 87-433.

Exhibit 3



US Department
of Transportation
**Federal Aviation
Administration**

**SYSTEM MANAGEMENT BRANCH, AEA-530
AIR TRAFFIC DIVISION/EASTERN REGION
FEDERAL AVIATION ADMINISTRATION
FITZGERALD FEDERAL BUILDING
JFK INTERNATIONAL AIRPORT
JAMAICA, NEW YORK 11430**

IN REPLY REFER TO
**AERONAUTICAL STUDY
NO. 92-AEA-0200-OE**

ACKNOWLEDGMENT OF NOTICE OF PROPOSED CONSTRUCTION OR ALTERATION

SPONSOR	Cunningham Communications, Inc. James E. Shipman 6710 New Hope Drive Springfield, VA 22151	CONSTRUCTION LOCATION	
		PLACE NAME Catonsville, MD	
		LATITUDE 39-17-13	LONGITUDE 76-45-16
		HEIGHT (IN FEET)	
CONSTRUCTION PROPOSED	DESCRIPTION Antenna Tower - No Transmitter	ABOVE GROUND 709	ABOVE MSL 1249

The Federal Aviation Administration hereby acknowledges receipt of notice dated **February 11, 1992** concerning the proposed construction or alteration described above.

A study has been conducted under the provisions of Part 77 of the Federal Aviation Regulations to determine whether the proposed construction would be an obstruction to air navigation, whether it should be marked and lighted to enhance safety in air navigation, and whether supplemental notice of start and completion of construction is required to permit timely charting and notification to airmen. The findings of that study are as follows:

- ☐ The proposed construction does not require a notice to FAA.
- ☐ The proposed construction is not identified as an obstruction under any standard of FAR, Part 77, Subpart C and would not be a hazard to air navigation.
- ☒ The proposed construction is identified as an obstruction under the standards of FAR, Part 77, Subpart C but would not be a hazard to air navigation.
- ☒ The structure should be obstruction marked and lighted per FAA Advisory Circular AC 70/7460-1, "Obstruction Marking and Lighting," Chapters 3, 4, 5 and 13
- ☒ Supplemental notice is required at least 48 hours before the start of construction and within five days after construction reaches its greatest height (use the enclosed FAA form).

This determination expires on **August 10, 1993** unless:

- (a) extended, revised or terminated by the issuing office;
- (b) the construction is subject to the licensing authority of the Federal Communications Commission and an application for a construction permit is made to the FCC on or before the above expiration date. In such case the determination expires on the date

CERTIFICATE OF SERVICE

I, SYBIL R. BRIGGS, do hereby certify that I have this 10th day of May, 1992, mailed by first class United States mail, postage prepaid, copies of the foregoing "MOTION FOR SUMMARY DECISION*" to the following:

*The Honorable Richard L. Sippel
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W., Room 214
Washington, D.C. 20554

*Norman Goldstein, Esq.
*Robert Zauner, Esq.
Hearing Branch
Enforcement Division
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Federal Communications Commission
2025 M Street, N.W., Room 7212
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*By Hand


Sybil R. Briggs